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No. 1143

In the Supreme Court of the United States

OCTOBER TERM, 1969

MIDWESTERN UNITED LIFE INSURANCE COMPANY,
Petitioner,

vs.

TORA C. BRENNAN,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner Midwestern United Life Insurance Company (MULIC), pursuant to Rule 24(4) of the Court, replies to respondent's brief in opposition to the petition for Writ of Certiorari as follows:

1. Respondent's brief is largely devoted to a restatement of the facts, apparently designed to persuade the Court that the decision below was equitable, regardless of the resolution of the questions presented in MULIC's petition. Respondent's statement of facts is highly argumentative, misleading and in some instances grossly in-

accurate. None of the basic questions presented in this case, however, require the resolution of factual disputes. The errors complained of are apparent on the face of the opinions of the District Court and the Court of Appeals.

2. Respondent asserts that this case does not present the question of whether Section 10(b) of the Securities Exchange Act of 1934 or Rule 10b-5 of the Securities and Exchange Commission imposes a duty upon corporations to report irregularities in the conduct of independent securities brokers to the state or Federal regulatory agencies. In support of that contention respondent points out that in reaching its decision the Court of Appeals referred to matters in addition to MULIC's failure to report.

Petitioner accurately described the basis for the decision of the majority of the Court of Appeals in its Petition for Writ of Certiorari (p. 13).

Respondent fails to recognize that to say that the decision of the Court below was not based *solely* upon MULIC's failure to report is not to say that the decision does not present the question of whether Section 10(b) or Rule 10b-5 create a duty to report. The Court of Appeals clearly held that petitioner had a duty to report the misconduct of an independent securities broker to the regulatory agencies and that its failure to make such a report constituted a form of aiding and abetting "cognizable under Section 10(b) and Rule 10b-5" which gave rise to liability to persons purchasing securities from the independent broker.

While the failure to report was not the only factor considered by the Court below, it was clearly an essential element in the finding of liability. Indeed, the only causal connection which the Court of Appeals finds between petitioner's conduct and respondent's injury relates ex-

clusively to the failure to report. The Court held that if MULIC had reported Dobich's misconduct to the regulatory agencies, the agencies would have ended Dobich's activities and thus avoided the injuries suffered by persons who purchased securities from Dobich after December 1, 1964. The logic of the Court of Appeals' decision imposing liability on MULIC to persons who purchased securities from Dobich on and after December 1, 1964, is dependent upon the proposition that by that date MULIC had sufficient information about Dobich's conduct to trigger a duty to report which MULIC breached.[1] Thus in the absence of a duty to report cognizable under Section 10(b) and Rule 10b-5, there can be no liability to respondent on the part of MULIC. The novel and far-reaching question raised in Part I of MULIC's Petition for Writ of Certiorari is directly presented by the decision in this case and should be resolved by this Court.[2]

3. Contrary to the contention in respondent's brief, the questions presented in Part II of the Petition for Writ of Certiorari are apparent on the face of the majority opinion of the Court of Appeals for the Seventh Circuit. Respondent apparently concedes that shifting the burden of proof of causal connection to the defendant was improper and tries to avoid the consequences of this error by suggesting that it was unnecessary for respondent to show a causal connection under the traditional "but for"

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[1] The Court of Appeals did not adopt the alternate theory that Dobich would have voluntarily ended his misconduct if MULIC had not "withdrawn" its threat to report him.

[2] As pointed out in MULIC's petitions, leading scholars of Securities law have recognized the existence and far-reaching importance of that question in this case (Pet. p. 15).

test applied by the District Court. To suggest that a less stringent test might have been applied in determining proximate cause, however, does not excuse placing the burden of proof with respect to an essential element of the plaintiff's cause of action on the defendant.[3] Whatever the proper test of causal connection, the burden of introducing proof sufficient to meet that test is on the plaintiff.

The fact that many of the findings of the lower Court which were affirmed by the Court of Appeals were reached by compounding inferences is apparent on the face of the District Court's opinion and the opinion of the majority of the Court of Appeals. The same is true with respect to the standards of review applied by the Court of Appeals in reviewing inferences drawn from undisputed evidence.

Respectfully submitted,

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[3] Moreover, the "facilitation" test urged by respondent has nothing to do with proximate cause. It is a test applied in some jurisdictions to determine the substantive issue of whether one is an "aider or abettor" in criminal cases. The Restatement test to which respondent refers (p. 18) is inapplicable because it requires proof of liability prior to its application.